

April 21, 2010

U.S. Army Corps of Engineers
Attn: CECW-CE, Douglas J. Wade
441 G Street, NW
Washington, DC 20314-1000

Douglas.J.Wade@usace.army.mil

RE: Docket Number COE-2010-0007

Dear Mr. Wade,

Thank you for the opportunity to comment on the U.S. Army Corps of Engineers' proposed "Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls," docket number COE-2010-0007.

The Nature Conservancy is a global, non-profit organization dedicated to the conservation of biodiversity. Our mission is to preserve the plants, animals and natural communities that represent the diversity of life on Earth by protecting the lands and waters they need to survive. We work in all 50 states and in 30 countries around the world, and we seek to achieve our mission through science-based planning and implementation of science-based conservation strategies that provide for the needs of people and nature.

As you are aware, The Nature Conservancy has a long-standing partnership with the Army Corps, and we collaborate and work with the Corps on many projects throughout California and across the country. This partnership has led to innovative approaches and projects that enable both organizations to achieve their respective and, oftentimes, complementary goals.

In the spirit of our partnership, we offer the following comments on the Corps' proposed process for requesting a variance from the Corps vegetation standards for levees and floodwalls (Variance Process). We recognize it is of utmost national importance to ensure the integrity of levee-and-floodwall systems to ensure they provide the protection on which communities depend. However, we are concerned the Variance Process, as proposed, is unduly onerous, time-consuming and costly, and will impose a significant burden upon local maintaining agencies that seek to obtain a variance from the Corps' vegetation management standards. We are concerned because the difficulty in obtaining a variance could unnecessarily result in the removal of important stands of vegetation that provide habitat for threatened and endangered species in California and elsewhere in the country.

We ask the Corps to consider the following general and specific comments on the proposed Variance Process.

General Comments

- 1) As stated above, the proposed Variance Process will likely be onerous and costly to those agencies seeking to obtain a variance from the Corps' vegetation management standards. Many of the plans, reports, and analyses required to comply with the policy will require significant staff time and additional resources to hire outside expertise. Placing the burden of compliance with the National Environmental Policy Act (NEPA) and Endangered Species Act (ESA) on the project sponsor significantly increases the financial burden of applying for a variance. Furthermore, the process seems to have little predictability; for example, it does not specify time frames by which an applicant will receive notice that its variance request has been approved or denied. This delay and resulting uncertainty adds to the burden placed upon applicants by the proposed Variance Process. In addition, the policy contains no appeal process.
- 2) While we understand that unplanned vegetation can threaten the integrity of a levee or floodwall, the Corps' mandatory vegetation-management standards for levees and floodwalls and the policy guidance for obtaining a regional variance from those standards should include an evaluation of the potential negative impacts of removing woody vegetation from these structures. Large-scale removal of vegetation that is helping to reduce erosion may weaken the structure and leave voids that would increase erosion or cause other problems.
- 3) The vegetation standards and variance policy should distinguish between existing levees with woody vegetation, rehabilitated levees that include vegetation as part of the design, and new levees that include vegetation as part of the design.
- 4) The riparian vegetation along California's rivers and streams provides critical habitat for many species, several of which are listed as threatened or endangered under federal or state Endangered Species acts. The costs of degrading those ecosystems and further endangering these species should be considered in the variance policy.
- 5) Section 202(g) of the Water Resources Development Act of 1996 states:

(g) VEGETATION MANAGEMENT GUIDELINES.—

(1) REVIEW.—The Secretary shall undertake a comprehensive review of the current policy guidelines on vegetation management for levees. The review shall examine current policies in view of the varied interests in providing flood control, preserving, protecting, and enhancing natural resources, protecting the rights of Native Americans pursuant to treaty and statute, and such other factors as the Secretary considers appropriate.

(2) COOPERATION AND CONSULTATION.—The review under this section shall be undertaken in cooperation with interested Federal agencies and in consultation with interested representatives of State and local governments and the public.

(3) REVISION OF GUIDELINES.—Based upon the results of the review, the Secretary shall revise...the policy guidelines so as to provide a coherent and coordinated policy for vegetation

management for levees. Such revised guidelines shall address regional variations in levee management and resource needs....

To provide effective implementation of Section 202(g) of WRDA 1996, the regional variance policy should include consideration of the actual costs and economic feasibility of removing vegetation from levees and an accurate assessment of the risk to the structure from leaving ecologically important vegetation in place. As with other Corps policies, the economic feasibility and mitigation costs of implementing a Corps-mandated action at various locations should be considered when granting a variance from the Corps standards.

Specific Comments

- 1) Paragraph 6.a.(1) of the proposed “Policy Guidance Letter–Variance From Vegetation Standards for Levees and Floodwalls” as published in the February 9, 2010, Federal Register notice, states that the variance being requested must be shown to be necessary and the “only feasible means to preserve, protect, and enhance natural resources and/or protect the rights of Native Americans”. This standard of “only feasible means” is so restrictive that no variance is likely to be issued. This provision has the potential to remove the ability to use vegetation as a management tool to better protect the public and property, enhance ecosystem services, and help preserve cultural resources. This provision should be changed to allow an array of alternatives that meet design criteria.
- 2) Paragraph 7.c.(5) requires certain data that generally are unlikely to be provided (that is, there is little or no technical information available). Therefore, few entities will be able to fully satisfy the application requirements; this situation creates an automatic outcome of denying a variance from the vegetation standards. This provision should be changed to make the inclusion of root zone information in the application optional not mandatory.
- 3) Paragraph 9.e. should be changed to include vegetation benefits. The proposed variance policy does not recognize beneficial effects of vegetation with regard to safety or structural integrity or the functionality of a levee. The policy should consider and request information related to the structural benefits of vegetation. Moreover, the variance policy does not provide the opportunity to consider the value of ecosystem benefits or services or environmental enhancements.
- 4) Paragraph 9.e. effectively eliminates consideration of a variance that would permit any woody vegetation in riparian areas (as opposed to just on the levee or floodwall) where project levees are located, which would result in the removal of vegetation that greatly benefits aquatic species such as endangered Chinook salmon and avian species like the yellow-billed cuckoo.
- 5) As drafted, the proposed Variance Process goes beyond describing an administrative process and includes potential actions that may cause adverse impacts to the environment; therefore, a Finding

of No Significant Impact (FONSI) is inadequate. For example, Paragraph 10, "Existing Variances or Other Deviations" states that existing variances, agreements, or other deviations not submitted for an Agency Technical Review by September 30, 2010, may no longer be considered valid. This provision creates the potential for automatically invalidating existing agreements and requiring removal of vegetation. Wholesale vegetation removal would likely require a full NEPA analysis or ESA consultation. The FONSI does not address this aspect of the variance policy guidance. The variance policy should be amended to remove the requirement to submit applications for existing variances, or a NEPA analysis of the variance policy and process should be completed.

- 6) Related to comment 5 above, paragraph 11 requires that the applicant provide all NEPA and ESA compliance. The act of invalidating an existing variance is a Corps action; therefore, compliance with NEPA and ESA for this action should be the Corps' responsibility as the Corps is the lead entity in this action. The applicant has no control over whether the Corps invalidates an existing variance or waiver. As drafted, the proposed Variance Process is biased toward disapproving a variance, and requiring all existing variances to be resubmitted will likely lead to significant environmental impacts; therefore, the Corps should conduct environmental compliance for invalidating existing variances.
- 7) The proposed Variance Process conflicts with regional policy being developed as part of the California Central Valley Flood Management Planning Program (CVFMPP), a program for producing a comprehensive Central Valley Flood Protection Plan that is mandated by state legislation and includes extensive public stakeholder involvement. The proposed Variance Process also conflicts with the California Levees Roundtable Framework Agreement, to which the Corps agreed. The language in WRDA 1996 Section 202(g) recognizes "regional variations in levee management and resource needs" of different regions and locations of the United States; yet, the proposed variance policy focuses on individual levees and physical features of levee systems. The California Levees Roundtable's approach is more consistent with WRDA 1996 than the Corps' proposed Variance Process; therefore, the Variance Process should contain provisions for including the outcomes of the work being conducted as part of the CVFMPP and/or the work carried out as part of the Roundtable Framework. The Variance Process should also provide for inclusion of any regional policy that emerges or currently directs vegetation management in other regions of the country, or better yet, the proposed Variance Policy would only apply where regional policies do not exist.

Thank you for the opportunity to comment on this draft policy and process. We would welcome the opportunity to work with the Corps to develop a more balanced Variance Process that addresses the imperatives of protecting public safety and protecting, preserving and enhancing natural resources. If

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you have questions or would like to discuss our comments on the proposed Variance Process, please contact me at (415) 281-0456.

Sincerely,

A handwritten signature in blue ink, appearing to read "Mike Sweeney", with a long horizontal flourish extending to the right.

Mike Sweeney
Executive Director
California Chapter

cc: Jay Ziegler, Director of External Affairs, The Nature Conservancy